

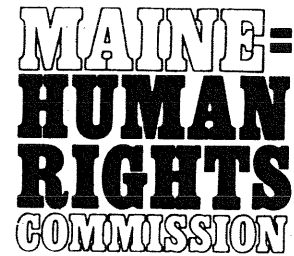
INVESTIGATOR'S REPORT E08-0469

November 9, 2009

Darcy Pinette (Chapman)

v.

Northeast Publishing Company (Presque Isle)



51 STATE HOUSE STATION
AUGUSTA, ME 04333-0051
www.maine.gov/mhrc

Executive Director
PATRICIA E. RYAN

I. COMPLAINANT'S CHARGE:

Commission Counsel
JOHN P. GAUSE

Complainant, Darcy Pinette, alleged that Respondent, Northeast Publishing Company, terminated her employment because of her physical disability.

II. RESPONDENT'S ANSWER:

Respondent, Northeast Publishing Company, denied the allegation of discrimination and said that Complainant was terminated for poor job performance and an inordinate amount of time text messaging on her phone and on personal calls.

III. JURISDICTIONAL DATA:

- 1) Date of alleged discrimination: February 18, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: August 14, 2008.
- 3) Respondent employs over 40 employees and is subject to the Maine Human Rights Act, the Americans With Disabilities Act, as well as state and federal employment regulations.
- 4) Complainant is represented by Norman Trask, Esq. Respondent is represented by Clare Hudson Payne, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, a fact finding conference.

IV. DEVELOPMENT OF FACTS:

- 1) The parties and issues in this case are as follows:
 - a) Complainant, Darcy Pinette, worked for Respondent as a receptionist since October 2004. She has a history of cancer. She was terminated on February 18, 2008.

INVESTIGATOR'S REPORT E08-0469

- b) The Respondent, Northeast Publishing Company (NEP), which is located in Presque Isle, Maine, publishes four weekly papers in northern and eastern Maine and contracts printing work for other entities.
 - c) Supervisor is the Business Manager and was Complainant's supervisor. She is the person who terminated Complainant's employment. Supervisor's Assistant is Supervisor's assistant and is the person Complainant states she discussed her concerns with that she feared her cancer had returned. Operations Director made the final decision to terminate Complainant.
 - d) Complainant's employment was terminated on February 18, 2008.
 - e) Respondent alleged that Complainant was terminated for poor job performance and an inordinate amount of time text messaging on her phone and on personal calls. Complainant alleges that Respondent's stated reason is false and that she was actually terminated because of her physical disability.
- 2) The following is undisputed:
- a) Complainant began employment for Respondent on October 25, 2004.
 - b) Complainant was diagnosed with fibrosarcoma¹, a rare type of cancer, in December 2006.
 - c) Complainant underwent surgery to remove a tumor from her abdomen and was out of work from December 18, 2006 through December 22, 2006. When doctors realized the tumor was cancerous, she had a second surgery to remove a larger portion of the tumor and was out of work from December 26, 2006 through December 29, 2006. She subsequently underwent radiation treatment for six weeks, which ended in February 2007.
- 3) The parties provide the following in regards to Complainant's job performance:
- a) (Supervisor) Complainant's job performance was adequate through September 2007. She began receiving complaints from Complainant's co-workers about Complainant's attitude, excessive personal phone calls, text messaging and internet use. She then observed it herself. Then her boss, Operations Manager, observed it and told her that she had to "do something."
 - b) (Supervisor) In October 2007, she spoke to Complainant regarding her personal use of the internet on company computers during working hours

¹ Fibrosarcoma is a blood born cancer that attacks a person's organs.

INVESTIGATOR'S REPORT E08-0469

(MySpace, sending personal messages). Supervisor told Complainant this was not allowed. Complainant told her that she was only on the website checking the weather and news. Supervisor corrected her and told her, "no, you were on My Space." Supervisor does not recall Complainant's reaction.

- c) (Supervisor) She would estimate that on some days Complainant spent an hour or two texting.
- d) (Complainant) She did not text for more than twenty minutes to one-half hour a day. She acknowledges that she was spoken to about personal use of the computer. She had been looking at My Space and she did admit to texting. She never took breaks and considered the texting as time she would have taken on breaks and would have had to ask someone to cover the reception desk for her during those breaks. Supervisor never told her to stop texting, she just said that Complainant was texting too often. There were others in the company that spent excessive amounts of time on personal calls and texting including Supervisor and Operations Director. There were also others who used the computer for personal use and looking at My Space. She could see it in their "histories" that people were viewing this at work.
- e) (Supervisor) She did not receive complaints about others texting too much. If she witnessed it, she would speak to those employees also.
- f) (Supervisor) On January 11, 2008, after receiving complaints from employees in the business office, Supervisor informed Complainant that she was not performing her job duties on a consistent basis. Supervisor also discussed Complainant's personal phone calls and the inordinate amount of Complainant spent texting on her cell phone during working hours. "Everyone uses the phone for short periods to call home and check on kids but when it's excessive, it's a problem." Texting is considered personal use of phones. Supervisor also spoke to Complainant about her need to call and leave a message when she was going to be late for work or to call Supervisor at home before 7 a.m. if she was going to be out so that Supervisor could arrange coverage for the front desk.
- g) (Complainant) In January 2008, she was called into Supervisor's office. Supervisor just slid a paper across the table and said, "This is your job description, do you disagree?" "That was about it." The handwritten information on the form was not discussed nor was it written on the copy she was given. (See attached)
- h) (Supervisor) The typewritten notations on the paper were Complainant's job duties. The handwritten notes were the issues that Supervisor had with Complainant that co-workers and others had complained about.

INVESTIGATOR'S REPORT E08-0469

- i) (Supervisor) Some of the supervisors had been complaining about Complainant's attitude saying she could be "a little short" or her moods weren't always good. Complainant cried a lot and was having personal problems at home.
- j) (Complainant) She does not remember Supervisor talking to her about her attitude but Complainant acknowledges that she was told she had to leave her personal problems at home. She knew she had been upset but tried to make it a point not to take it out on others. There may have been times she could have been short with others but didn't realize it.
- k) (Supervisor) On February 5, 2008, Complainant was sent to The Star Herald (newspaper office at another location in Presque Isle) to cover for a sick employee. On February 6, 2008, the advertising manager of The Star Herald told Supervisor that Complainant spent a considerable amount of time on the Internet and the phone for personal use. He was upset as they were very busy that day. He has been with the company for 35 years. "He knows when someone is not doing their job." She does not recall if she spoke to Complainant about this or not.
- l) (Complainant) Regarding advertising manager's allegation that she was not doing her job, she was proofing the newspapers on February 5, 2008. Since this was not a requirement for the receptionist at that office, he insinuated she was not doing her job. They were not very busy that day – they were never busy on Wednesdays. "Advertising Manager seems upset every day you talk to him. He was close to retirement. He did not say anything to her." He had given her tear sheets to do and she told him that until she spoke to another employee at the main office to see if she had already done the tear sheets, Complainant could not do them. Advertising Manager thought she should be doing them and not have to ask anyone else.
- m) (Respondent) On February 11 and 12, 2008, Complainant was covering for Ms. B, who was out sick and she was assisting in training a new employee (Ms. C). Ms. B informed Supervisor that everything Complainant showed Ms. C how to do was wrong and Ms. C had to throw away her notes and start fresh. Ms. B stated that it appeared that Complainant was setting Ms. C up to fail. Ms. C told Ms. B that Complainant was "playing" with her phone all day so Ms. C finally asked Complainant "what are you doing?" Complainant said she was text messaging to which Ms. C stated, "Aren't you supposed to be training me?" Ms. C confirmed this to Supervisor on February 13, 2008 and further added that Complainant also said, "Don't tell (the advertising manager) because he would get mad."

INVESTIGATOR'S REPORT E08-0469

- n) (Complainant) She only worked in the above-mentioned office on occasion – not all the time. Every office was different². She trained the new employee to the best of her ability. She was not “playing” with her phone all day. She had to skip lunch breaks numerous times in that office for lack of coverage³. She considered any time she spent texting her allotted break time. She did text more at that office than she did at her regular office. If she had nothing to do, she would text. She would ask for work but if there was none, she would text. She did tell the new employee not to tell advertising manager because he would get mad because he gets mad over everything. She was waiting to teach the new employee how to do tear sheets, but couldn't because she was waiting for Advertising Manager to give her the lists.
- o) (Supervisor) Employees are allowed fifteen minute breaks. Most employees don't take breaks. “It's like reading the paper. We want people to go to the break room to do that – not sit out where customers can see them reading the paper.”
- p) (Complainant – in response to investigator's question as to whether telling the co-worker not to tell Ad Manager she was texting would indicate she knew she was not supposed to be texting) “No, it was more along the lines that (Ad Manager) felt that he was the manager and could pass out the work” and she was there to do the jobs that she was trained for “not to do what (Ad Manager) told her to do.”
- q) (Respondent's answers) Supervisor had also received complaints from Ms. D that ad orders had not been entered on time, from Ms. E that credit card processing was not done as needed, and from Ms. F that job tickets were not filed.
- r) (Complainant) In reference to other employees' complaints about her, she did ad orders as they were needed not when Ms. D requested, she worked on deadline times not someone elses' orders who was not her boss. Ms. D had been on her case for months trying to find excuses to be short with her. As for the credit cards, she did them when she had the chance – she could only do them when she had coverage in the front office.
- s) (Complainant) Ms. D had told her repeatedly that, since the company had let others go to be replaced with lower paid employees, that she was afraid she would be the next one to go and they would give Complainant her job. So Ms. D set out to make her look incompetent in her job abilities. Another employee reported this to Supervisor as she was afraid Complainant would quit because of the harassment. The false allegations

² Supervisor states all the satellite offices are operated in the same manner.

³ Complainant acknowledges she was never told that she could not take breaks but she was “getting hassled” by others when they had to cover for her breaks so it was easier not to take one.

INVESTIGATOR'S REPORT E08-0469

against her by Ms. D were used against her. "If Supervisor had looked into it, she would have known the allegations were false."

- t) (Supervisor) The co-worker mentioned above actually reported to Supervisor that there was too much bickering going on between Complainant and Ms. D and asked Supervisor to speak to both of them. She was one of the people who reported that Complainant was not doing her job.
 - u) (Complainant) There were not complaints about her job performance until she was diagnosed with cancer.
 - v) (Supervisor) She has had to speak to two sales reps about personal use of the computer when others reported them. There were no other issues with them after she spoke to them. They have a computer person who monitors everyone's computers. He has gone around and taken games off the company computers. He has spoken to an employee in Production about using My Space. He has since blocked My Space from the company computers.
 - w) (Supervisor) She was supervisor of five receptionists – there were no complaints against any of the other receptionists either by their co-workers or other supervisors.
- 4) Complainant provides the following about events leading up to her termination:
- a) After her radiation treatments, she initially felt well. However, in late fall or early winter of 2007, she began to feel poorly and was afraid that her cancer had returned. She put off seeing her doctor until after the holidays. She continued to work and believes she did her job well.
 - b) On Friday, February 15, 2008 she went to see her doctor and underwent a CT scan.
 - c) On the morning of February 18, 2008, she told Assistant Supervisor that although she did not yet have the test results, she knew her cancer had returned. Complainant stated to Assistant Supervisor, "It is not yet confirmed, but I know my cancer is back." She told Assistant Supervisor that she had called her doctor on Monday morning to get the results of her CT scan and was told that the doctor wanted to speak with her on Wednesday. She told Assistant Supervisor that she knew then that her cancer had returned or they would have told her the results were good over the phone.⁴ She was leaning up against Assistant Supervisor's cubicle. Supervisor was in her office. The door was open. "She was only about five feet away from me." When Complainant turned to look, Supervisor

⁴Her cancer had returned but she did not get the results until after she was terminated.

INVESTIGATOR'S REPORT E08-0469

was looking at her. When Complainant got back to her desk, Supervisor had shut her door and was on the phone, although Complainant does not know who she was speaking to.

- d) At the end of the work day on February 18, 2008, Supervisor came to her and informed her that she was terminated, effective immediately. The reason given was that she had been "texting" at work. She had never received any formal or written warnings about texting at work (although she had been spoken to about it as outlined previously).
 - e) She believes she was terminated because her employer was aware that her cancer had returned and that she would be undergoing expensive medical treatment and missing time from work due to the recurrence of her cancer.
- 5) Respondent provides the following regarding Complainant's termination and their response to the above:
- a) (Supervisor) She knew Complainant had a doctor's appointment that Friday although she did not know it was for a CT scan. She was aware that Complainant had CT scans every 3-4 months.
 - b) (Supervisor) She did not overhear the conversation that Complainant describes above.
 - c) (Supervisor) After Advertising Manager complained to her on February 6, 2008 about Complainant's performance and after hearing from Ms. D and Ms. C about Complainant's training of the new employee on February 11th and 12th, 2008, she decided to meet with Operations Director. Complainant was not in the office on February 14, 2008 or February 15, 2008.
 - d) (Supervisor) On February 15, 2008, Supervisor and Operations Director met to discuss Complainant's performance. Supervisor felt that Complainant had ignored their October 2007 discussion regarding Complainant's excessive personal use of the computer and personal messages as well as their discussion on January 11, 2008 regarding the need for Complainant to perform her job duties and not to spend time on personal phone calls or text messaging. Because of all of the above-mentioned performance issues and the complaint from Advertising Manager, Supervisor and Operations Director decided to terminate Complainant's employment on February 18, 2008. Operations Director made the final decision. Operations Director told Supervisor to wait until the end of the day on Monday so that it would be the least disruptive to the office. He was not present for the termination.

INVESTIGATOR'S REPORT E08-0469

- e) (Operations Director – Signed Affidavit) He has been employed by Respondent since 1968. He met with Supervisor on February 15, 2008 to discuss issues relating to Complainant's job performance. Supervisor made him aware of complaints that were raised with Complainant text messaging, not doing anything when she was assigned at the satellite office filling in and training a new receptionist. Based on his prior discussions with Supervisor in January 2008, they made the decision to terminate Complainant's employment.
 - f) (Supervisor) She met with Complainant on February 18, 2008 at 4:45 p.m. She gave her a termination paper to read. That paper indicated that she was being terminated. The memo outlined the performance issues which led up to the termination (including ad orders not being entered on time, credit card processing not done as needed, job tickets not filed, an inordinate amount of time text messaging on her phone and personal calls as well as the complaint from Ad Manager indicating she did not complete the daily tasks as needed and that she was text messaging when she was supposed to be training a new employee).
 - g) (Supervisor) Complainant read it and then left Supervisor's office, went to her desk, collected her personal things and left the office before Supervisor had an opportunity to say anything to her.
- 6) Complainant responds to the above as follows:
- a) She disagrees that she did not say anything to Supervisor when she was handed her termination papers. She told Supervisor "it was all a lie." Supervisor shrugged her shoulder and said she had received complaints. She did then walk out of Supervisor's office and left.
- 7) Supervisor's Assistant provides the following relative to the alleged conversation outlined in 4c above:
- a) (Affidavit dated February 11, 2009) Ms. Pinette never said anything to her either outside Supervisor's office or anywhere else to the effect that her cancer had returned or that she thought it had returned.
 - b) (At fact finding conference) Complainant did stand at the edge of her cubicle and told Supervisor's Assistant that she was waiting for results from her CT scan. She does not recall what her response was. There was no more to the conversation than that as far as she can recall.
 - c) The edge of her cubicle is about 5-6 feet from Supervisor's door and Supervisor's desk is about six feet inside her office so Supervisor would have been about twelve feet away during the conversation.

INVESTIGATOR'S REPORT E08-0469

- d) (At fact finding) Sometime later that day, she told Supervisor that Complainant was waiting for test results but she does not recall her response.
 - e) (Supervisor) She does not remember Supervisor's Assistant telling her this – she may have. However, Complainant had gone for several CT scans previously and they were all fine. She had no reason to believe the results would be different this time.
- 8) The following comparative evidence is provided:
- a) Complainant states that the company terminated several employees on the same day shortly after she began working for the company. She states they were told they were limiting positions due to cutbacks in jobs. These included one employee, whose husband was very ill and on company insurance; another employee – whose wife had breast cancer and was on company insurance; and a male employee, whose mother had cancer and was on company insurance.
 - b) Respondent provided information that they currently have three employees who have filed insurance claims for serious health issues including two who have heart conditions, one of whom had heart bypass surgery. They also provided information that spouses of four employees have filed insurance claims regarding a serious health issue or disability. In addition, there are four retirees or their spouses who are covered by the company's health insurance who have serious health issues or disabilities. They note that information about the specific nature of the claims filed with the insurance company is not provided to the company by the insurance administrator. The company only becomes aware of a serious health issue or disability if the employee relays this information to the employer.
 - c) Respondent provided information that they have not terminated anyone in the past two years other than Complainant.
 - d) (Supervisor) The person who assumed Complainant's job duties had Bipolar Disorder. That person left employment on their own.
- 9) Additional information provided:
- a) (Complainant) She was never denied time off for medical appointments and treatment.
 - b) (Complainant – in response to investigator's question as to how she was treated during her absences and on her return to work) There were no problems while she was out or upon her return. "It was basically just a normal day – went to work, did job, went home."

INVESTIGATOR'S REPORT E08-0469

- c) (Complainant's rebuttal) When she was first diagnosed with cancer, Supervisor told her to take whatever time she needed for radiation and doctor's appointments. She told Supervisor she would do them on her lunch break to avoid losing work time. Supervisor told her not to. She said that was Complainant's personal time and the company would work with her no matter how much time she needed. In July 2007, she was informed she had no personal or sick time left as she had used it all during radiation treatments. If she would have known that was how the company intended to "work with her," she would have gone on her lunch break as she initially planned.
- d) (Complainant – at fact finding) She had her treatments between 7:30 and 7:45 in the mornings before the start of the work day. Every one of her radiation treatments were in the morning. If she was late she would have to use leave time for that.
- e) (Supervisor) She told Complainant she had ten days of sick leave and then it would roll into her personal and vacation time. All employees have to charge their absences.
- f) (Supervisor) Complainant was actually over her allotted sick leave time for 2006 but they paid her and counted the absences as if they had occurred in 2007 where it was so close to the end of the year.
- g) (Complainant) She was out of sick leave after her cancer treatments. She took unpaid leave for a vacation which was not a problem for the Respondent.

V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. §4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Maine Human Rights Act provides, in part, that it is unlawful to discharge an employee because of physical disability. 5 M.R.S.A. §4572(1)(A).
- 3) Here, Complainant, Darcy Pinette, alleges that Respondent, Northeast Publishing Company, terminated her employment because of her physical disability.
- 4) Respondent, Northeast Publishing Company, denied the allegation of discrimination and states that Complainant was terminated for job performance issues.

INVESTIGATOR'S REPORT E08-0469

- 5) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that she (1) was a member of a protected class, (2) was qualified for the position she held, (3) suffered an adverse employment action, (4) in circumstances giving rise to an inference of discrimination. *See Harvey v. Mark*, 352 F. Supp. 2d 285, 288 (D.Conn. 2005). *Cf. Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 30 (1st Cir. 2002).
- 6) The Maine Human Rights Act, 5 M.R.S.A. § 4553-A, defines "physical or mental disability," in relevant part, as follows:

1. Physical or Mental Disability, defined. Physical or mental disability" means: ...B. Without regard to severity unless otherwise indicated: ...cancer; C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.
- 7) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. *See City of Auburn*, 408 A.2d at 1262, 1267-68.
- 8) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 9) Here, Complainant has established a prima-facie case by showing that (1) she has a history of cancer; (2) she was qualified for the position she held; (3) she was terminated; (4) the timing of her termination gives the inference of discrimination.
- 10) Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's termination, namely, job performance issues.
- 11) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination brought about her termination, with reasoning as follows:
 - a) In Respondent's defense, the following is noted: Complainant was spoken to about personal use of the computer and excessive texting at work. It is also confirmed that Complainant's co-workers complained about

INVESTIGATOR'S REPORT E08-0469

Complainant's attitude and job performance. It is also true that Respondent allowed Complainant to take unpaid leave for a vacation when all of her time had expired. Respondent also counted some of Complainant's 2006 absences as 2007 absences so that Complainant could be paid for that missed time.

- b) However, even after noting the above, it is troublesome to this investigator that in Supervisor Assistant's written affidavit she indicated that Ms. Pinette never said anything to her either outside Supervisor's office or anywhere else to the effect that her cancer had returned or that she thought it had returned. At fact finding, however, she acknowledged that Complainant stood at her cubicle and said she was awaiting the results of a CT scan. She stated that there was no more to the conversation than that, that she could recall. This was not convincing. It is highly unlikely that Complainant would tell Supervisor's Assistant that she was waiting for the results of a CT scan and that was the end of the conversation. It is hard to imagine that there was not at least more dialogue that went along with this conversation. Complainant's version of this conversation seems the more likely scenario.
- c) It is also troublesome that while Supervisor states she did not overhear this conversation, it appears that she was standing only six to twelve feet away from Complainant when the conversation occurred. Also, Supervisor's Assistant states that she told Supervisor that afternoon that Complainant was waiting for test results. Supervisor stated she did not recall that conversation. She further stated that Complainant had gone for several CT scans previously and they were all fine and she had no reason to believe the results would be different this time. However, given Complainant's testimony that she told Supervisor's Assistant that she knew the cancer had returned because the doctor wanted to meet with her on Wednesday when normally they would just tell her over the phone that the results were good, this could certainly give Supervisor and Supervisor's Assistant reason to believe that this time the results could be different.
- d) In summary, even though Respondent has provided information relating to performance issues regarding Complainant, the timing of the termination, along with the testimony outlined above, leads to the conclusion that there is at least an even chance of Complainant proving unlawful discrimination.

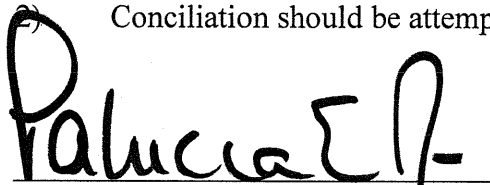
VI. RECOMMENDATION:

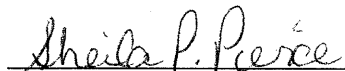
For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

INVESTIGATOR'S REPORT E08-0469

- 1) There are **Reasonable Grounds** to believe that the Respondent, Northeast Publishing Company, terminated Complainant, Darcy Pinette's employment because of her physical disability;

2) Conciliation should be attempted in accordance with 5 M.R.S.A. §4612(3).


Patricia E. Ryan, Executive Director


Sheila P. Pierce, Field Investigator